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No. 04-971

IN THE

Supreme Court of the United States

SERRA CANYON COMPANY, LTD.,

Petitioner,

v.

CALIFORNIA COASTAL COMMISSION, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the California Court of Appeal, Second District, Division Two

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Petitioner seeks review of a California procedural bar that shields from review, and thereby effectively condones, flagrant evasions of the constitutional restrictions this Court has placed on the use of local zoning powers to take private property without compensation. In this case, the California Coastal Commission approved the expansion of a mobile home park on the condition that the property owner record an offer to dedicate a valuable and completely unrelated piece of coastal property some seven miles away. More than two decades later, the California Coastal Conservancy accepted that offer and acquired the property in fee simple, without paying a penny in compensation. In their opposition, respondents do not even attempt to show that this appropriation of land satisfies the "nexus" and "proportionality" requirements this Court established in *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994).

Instead, they seek to shield their unconstitutional conduct from review by claiming that the very procedural bar petitioner is challenging constitutes an independent and adequate state law ground that deprives this Court of jurisdiction. This contention is baseless. In applying its procedural bar, the lower court necessarily decided two questions of federal law: (1) that no legally distinct property deprivation occurs when a state entity accepts a coerced offer to dedicate in fee simple absolute the entirety of a piece of property; and (2) that a takings challenge for such a complete loss of property is ripe when an offer to dedicate an easement is first coerced (even though, at the time of the coercion, no state entity has made a final decision to deprive the owner of its property and thus the deprivation may never occur). Because resolution of the state procedural law question inescapably depended on resolution of antecedent federal law

issues, this Court has jurisdiction to review the decision below.

Respondents' efforts to show that the lower court correctly resolved these federal issues are equally baseless. California law makes clear that offers to dedicate do not divest the property owners of their fundamental rights to possess and to exclude others from their property, as respondents themselves effectively concede. Because it is indisputable that no state agency made a final decision to strip petitioner of these valuable property rights until 2002, it is clear that, as a matter of federal law, petitioner's predecessor-in-interest could not have asserted a ripe takings claim two decades earlier, when the Coastal Commission imposed the offer-to-dedicate condition.

Finally, there is no merit to respondents' cynical contention that this case does not present important issues of federal law because there is no conflict among the lower courts. This case presents the fundamental question of whether states can avoid the requirements of *Nollan* and *Dolan* by confiscating property in a two-step process that can span a period of decades. Through that process, California stands poised to accept hundreds of coerced offers to dedicate that are set to expire, and the Ninth Circuit has refused to check this abuse. See *Daniel* v. *County of Santa Barbara*, 288 F.3d 375 (9th Cir. 2002). This Court has repeatedly made clear that the absence of a conflict among the lower courts does not confer an immunity on outlier states to violate the constitutional rights of their citizens. The Court should do so again here, to ensure that California and other states cannot ignore the mandate of the Takings Clause with impunity.

1. Respondents' contention that the decision below rests on an independent and adequate state law procedural bar is flatly mistaken. Petitioner argued below that, as a matter of federal takings law, the Coastal Conservancy's decision to accept the offer to dedicate worked a legally distinct deprivation of property for which respondents either must pay compensation

or demonstrate compliance with the requirements of *Nollan* and *Dolan*. In rejecting that argument, the court of appeal ruled, *inter alia*, that petitioner was bound by its predecessor-in-interest's "waiver of its right to seek timely writ review," and that petitioner was asserting a "belated inverse condemnation action." Pet. App. 5a-6a. Both bases for invoking state finality principles depend on the resolution of an antecedent federal law issue concerning when petitioner's takings or inverse condemnation claim first became ripe.

Thus, in order to find that petitioner's predecessor-in-interest, Adamson, "waived" a takings challenge to the 1981 permit decision, the lower court necessarily had to conclude that Adamson could (and therefore should) have asserted a ripe takings challenge within 60 days of that decision. In the absence of such a conclusion, Adamson obviously could not have waived a takings claim, as respondents themselves concede. See Opp. 18 ("[a]s the lower courts found here, . . . any taking claim was ripe at the time that the condition was first imposed in 1981, not decades later").[1] Similarly, petitioner's takings challenge to the Conservancy's acceptance of the offer to dedicate could only be a "*belated* inverse condemnation action" if Adamson could have previously asserted a "timely" takings claim.

Because the ripeness of a takings claim is a question of federal constitutional law, *Williamson County Reg'l Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 186 (1985), application of the procedural bar the lower court invoked in this case is inextricably intertwined with the resolution of a federal constitutional issue. In such circumstances,

> the state-law prong of the court's holding is not independent of federal law, and [this Court's]

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[1] For these same reasons, Adamson's failure to assert a takings claim within 60 days of the Commission's permit decision could only give res judicata effect to that decision, as respondents assert, if Adamson could have asserted a ripe takings claim within that time period.

> jurisdiction is not precluded. . . . In such a case, the federal-law holding is integral to the state court's disposition of the matter, and [a] ruling [by this Court] on the issue is in no respect advisory.

International Longshoreman's Ass'n v. *Davis*, 476 U.S. 380, 388 (1986) (omission in original) (quoting *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985)).

Wholly apart from the fact that application of the state procedural bar rests on resolution of a federal constitutional issue, the lower court also squarely rejected petitioner's contention that acceptance of an offer to dedicate works a legally distinct taking of property. The court of appeal ruled that a landowner who takes title to property "with full knowledge that it is subject to an existing, recorded [offer to dedicate] . . . cannot claim that the exercise of the [offer] amounts to a 'taking.'" Pet. App. 9a-10a. This ruling does not rest on an independent and adequate state law ground, but rather on a determination that property owners such as petitioner simply suffer no *constitutionally cognizable* injury when previously recorded offers to dedicate are accepted. This Court plainly has jurisdiction to review this federal constitutional ruling. See *Palazzolo* v. *Rhode Island*, 533 U.S. 606 (2001) (reviewing ruling that successive title holder with notice of existing state law limitation has no right to be free from an uncompensated taking).

In short, because the lower court inescapably resolved two federal constitutional questions in rejecting petitioner's takings challenge, there is no jurisdictional impediment to review of that decision by this Court.

2. It is equally clear that the lower court erred in its resolution of both of these federal constitutional issues. First, no state agency made a final decision to divest petitioner of its property in fee until the Conservancy accepted the offer to dedicate in 2002. Any claim seeking redress for a physical

taking, therefore, would have been entirely premature in 1981.

Indeed, for years after the Commission's permit decision, it remained uncertain whether any public agency would accept the offer to dedicate. See *Grupe* v. *California Coastal Comm'n*, 212 Cal. Rptr. 578, 602 (Cal. Ct. App. 1985) ("the Commission cannot know with certainty whether future events will occur that as a practical matter are essential to implementation of [an offer to dedicate]"). As a matter of well-settled California law, prior to accepting the offer, the state did not acquire any concrete property interest, and the owner maintained full possessory rights. See *People* v. *Williams*, 2 P. 393, 396 (Cal. 1884). In contrast, upon accepting the offer, the Conservancy acquired the property in fee simple, exercising complete dominion over it. As this Court has made clear, a property owner may not pursue a takings claim until there has been a *final* government decision to take the property. *Williamson County Reg'l Planning Comm'n*, 473 U.S. at 186. Accordingly, as a matter of federal law, Adamson could not have brought an inverse condemnation action for a physical taking in 1981, when the offer to dedicate was extracted by the Commission, because no state agency had made the necessary final determination to take the fee simple interest.[2] Cf. M. Berger, *Recent Developments in the Law of Inverse Condemnation*, Q203

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[2] By contrast, in the other state cases respondents cite, *see* Opp. 7-8, property owners challenged permit decisions that allegedly caused immediate property deprivations or injuries. *See California* v. *Superior Court*, 12 Cal. 3d 237 (1974) (denial of a permit application); *California Coastal Comm'n* v. *Superior Court*, 210 Cal. App. 3d 1488 (1989) (inverse condemnation action challenging public access easement); *Patrick Media Group, Inc.* v. *California Coastal Comm'n*, 9 Cal. App. 4th 592 (1992) (advertising restriction in a coastal development permit); *Hensler v. City of Glendale*, 876 P.2d 1043 (Cal. 1994) (adoption and application of an ordinance restricting development). In these cases, the property owners could have asserted ripe takings claims within the 60-day period, as the property owner in *Nollan* did. *See* Pet. 14-15.

ALI-ABA Video L. Rev. Study 1, 4 (1991) (noting that California appellate courts had reacted to *Nollan* and *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304 (1987), "by seeking ways to evade their evident mandate, either procedurally or substantively").

Second, the lower court plainly erred in ruling that petitioner suffered no constitutionally cognizable injury when the Conservancy accepted the offer and extinguished petitioner's interest in the subject property. Indeed, while respondents claim that petitioner misreads California law, they repeatedly affirm that property owners retain the right to exclude others from property notwithstanding recordation of an offer to dedicate, and that this right "is subject to immediate extinction *once the agency accepts the offer*." Opp. 15 (emphasis added); see also *id.* at 14 (property owner loses the right to exclude the public "*should the irrevocable offer ever be accepted* and opened to the public") (emphasis added). These concessions are compelled by California law, which has long recognized that "[a] dedication without acceptance is, in law, merely an offer to dedicate, and such an offer *does not impose any burdens nor confer any rights*," unless there is an acceptance. *City of Santa Clara* v. *Ivanovich*, 118 P.2d 303, 307 (Cal. Ct. App. 1941) (emphasis added); see also *Grupe*, 212 Cal. Rptr. at 592 (an offer to dedicate "will become effective *only if accepted*" and, until accepted, "there is no easement") (emphasis added); *Baldwin* v. *City of L.A.*, 83 Cal. Rptr. 2d 178, 187 (Cal. Ct. App. 1999) (unconditional acceptance is required to complete a dedication). Accordingly, the owner of property subject to an offer to dedicate "can exclude the public from the privately owned portion of his [property] until such time as a public agency . . . agrees to accept the offer." *Grupe*, 212 Cal. Rptr.

at 592; see also *Whalers' Village Club* v. *California Coastal Comm'n*, 220 Cal. Rptr. 2, 15 (Cal. Ct. App. 1985).[3]

Thus, the lower court was manifestly wrong in concluding that the Conservancy's acceptance was a mere "formality" and that petitioner's injury "derives *solely* from the Commission's 1981 permit condition." Pet. App. 5a, 8a (emphasis added). Although the permit decision was a necessary predicate, it was the Conservancy's acceptance that stripped petitioner of all ownership of its land, including the unconditional right to exclude others. Analogizing such an offer to an options contract, see Opp. 15, does not alter the fact that it is only the Conservancy's exercise of the right to take the property in fee before an offer to dedicate expires—not the owner's *conferral* of such a time-limited right—that divests the property owner of the right to exclude others.

Nor does *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), demonstrate that acceptance of the offer to dedicate worked no deprivation of property. Opp. 17. In *Lucas*, this Court noted that assertion of a previously granted *easement* would not constitute a separate taking. See *Lucas*, 505 U.S. at 1028-29 ("we assuredly *would* permit the government to assert a permanent easement that was a pre-existing limitation upon the landowner's title."). *Lucas* was careful to note, however, that there is no taking only when an antecedent inquiry into the nature of a property owner's estate reveals that "the proscribed use interests were not part of [the

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[3] Respondents' suggestion that the foregoing cases involved revocable, rather than irrevocable, offers to dedicate, Opp. 16, is simply false. In *Grupe*, for example, the property owner was required to record a document "'*irrevocably offering to dedicate* . . . an easement for public access.'" 212 Cal. Rptr. at 581 (emphasis altered) (quoting offer). Nor is there any meaningful distinction between a revocable offer to dedicate and an irrevocable offer that expires if not accepted within a prescribed period. Both allow a state entity to deprive owners of their property interests if the offers are accepted before a certain contingency occurs (*i.e.*, revocation or expiration prior to acceptance).

landowner's] title to begin with." See *id.* at 1027. By contrast, here mere recordation of the offer to dedicate did not grant the public any title to the property and did not limit the petitioner's or its predecessor in interest's ability to exclude others from the property.

Finally, respondents claim that the Conservancy's acceptance of the offer could not be a taking because, having acquired the property subject to the offer to dedicate, petitioner never had the right to deny the government's decision to accept the offer. Opp. 18. This argument betrays respondents' fundamental disregard for this Court's decisions in *Nollan* and *Dolan*. The Conservancy, like all other state entities, has a duty to conform its conduct to constitutional standards. This means that it must ensure that any previously-recorded offers to dedicate that it accepts have a nexus, and are proportional, to the property development to which those offers were tied; if an offer lacks the requisite nexus and proportionality, then the Conservancy cannot accept the offer unless it pays just compensation for the property rights it acquires.

Ensuring that state entities respect constitutional safeguards when accepting previously recorded offers to dedicate does not give *Nollan* retroactive effect. Opp. 9-11. It was the Conservancy's actions that stripped petitioner of its right to possess and exclude others from its property, and those actions did not occur until 2002, a full 15 years after *Nollan* was decided. Nor does enforcement of *Nollan*'s requirements allow property owners to acquire the benefits of a building permit while unfairly evading the conditions of those permits. Opp. 13. In *Nollan* itself, this Court explained that the Coastal Commission has no right to condition building permits on conveyance of property rights that do not serve to ameliorate the impacts of the approved development. If respondents can demonstrate that the dedication of unimproved property seven miles away from the expanded mobile home park meets *Nollan*'s requirements—something

they have never attempted to do—then the Conservancy can accept the offer without paying compensation. If those requirements cannot be met, however, then there is nothing unfair about allowing petitioner to invalidate a building permit condition that is unconstitutional.

3. In the end, respondents fall back on the cynical and misguided argument that this Court should permit California to violate the constitutional rights of its citizens because there is no conflict among the circuits and no treatise or law review articles have condemned the state's two-step confiscation scheme. Opp. 11-13. In essence, respondents claim that California is free to disregard *Nollan* until such time (if ever) that another state adopts a similar scheme and that scheme is invalidated by a state or federal court. This reliance on the absence of a "conflict" as a shield for unconstitutional conduct completely misconceives the role of this Court's certiorari jurisdiction to protect the fundamental rights of citizens.

Over the past decade, this Court has granted review in a series of takings cases—several of them, not coincidentally, arising in California—without mention of any purported conflict justifying that review. See *Brown* v. *Legal Found.*, 538 U.S. 216, 231 (2003) (no mention of conflict); *Tahoe-Sierra Reg'l Pres. Council, Inc.* v. *Tahoe Reg'l Planning Agency*, 535 U.S. 302, 320 (2002) (granting review "[b]ecause of the importance of the case"); *Palazzollo*, 533 U.S. at 611 (no mention of conflict); *Suitum* v. *Tahoe Reg'l Planning Agency*, 520 U.S. 725, 733 (1997) (granting review "to consider the ripeness of Suitum's takings claim"); *Lucas*, 505 U.S. at 1010 (no mention of conflict). Indeed, in *Dolan*, this Court granted review for exactly the reason petitioner seeks it here: because the decision below conflicted with the decision in *Nollan*. 512 U.S. at 383. Thus, the absence of lower court conflict does not confer immunity on outlier states that violate constitutional rights.

Moreover, the fact that no treatises or law reviews have addressed the takings claim petitioner asserts here is not evidence that petitioner's constitutional challenge is "peculiar." Opp. 12. It is, instead, a testament to the extraordinary and unprecedented nature of the state's conduct. Cf. *Connecticut* v. *Doehr*, 501 U.S. 1, 18 (1991) (invalidating, on due process grounds, pre-judgment attachment statute that differed from statutes in virtually every other state). Far from asking for a "new constitutional rule," petitioner simply asks this Court to intervene to forestall a massive, unconstitutional land grab that plainly violates the requirements of *Nollan* and *Dolan*. Indeed, respondents do not deny that the Coastal Commission is urging agencies throughout the state to accept hundreds of other soon-to-expire offers to dedicate with full knowledge that virtually none of the resulting property transfers could satisfy the strictures of the Takings Clause.

Nor is petitioner acting "presumptuous[ly]" in raising this issue. Opp. 12. As the *amicus* briefs of David Harner and the California Association of Realtors confirm, California landowners do not welcome the coerced confiscation of their property. Unless this Court makes clear, however, that procedural rules cannot be used to dismiss takings claims before they are ripe, hundreds of property owners will suffer precisely that fate. This Court should not wait to see if other states follow California's lead and adopt similar confiscatory schemes that flagrantly defy this Court's decisions. The decision below merits this Court's review.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the petition for certiorari, the Court should grant the petition.

Respectfully submitted,

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